2001

State of Utah v. Ray Kitchen : Brief of Defendant-Appellant

Utah Supreme Court

IN THE SUPREME COURT OF THE STATE OF UTAH

No. 14732

THE STATE OF UTAH,

Plaintiff-Respondent,

vs.

RAY KITCHEN,

Defendant-Appellant.

BRIEF OF DEFENDANT-APPELLANT

APPEAL FROM JUDGMENT OF THE DISTRICT
COURT OF UTAH COUNTY, UTAH,
HONORABLE MAURICE HARDING, JUDGE

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SUPREME COURT OF THE STATE OF UTAH

No. 14732

THE STATE OF UTAH,

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vs.

RAY KITCHEN,

Defendant-Appellant.

BRIEF OF DEFENDANT-APPELLANT

NATURE OF THE CASE

Appellant, Ray Kitchen, appeals from the finding of guilty to the charge of aiding and abetting Lynn Christiansen to present or cause to be presented proof in support of a false or fraudulent claim upon a contract of insurance for the payment of a loss, a felony of the second degree and the sentence imposed thereon in the Fourth Judicial District Court, Provo, Utah.

DISPOSITION IN LOWER COURT

On the 30th day of July, 1976, the appellant, Ray Kitchen, having been convicted by a jury of aiding and abetting Lynn Christiansen in filing a false insurance claim,

was sentenced to the Utah State Prison and fined $500.00. Execution of the prison term was suspended and the defendant was placed on two years probation.

RELIEF SOUGHT ON APPEAL

Appellant seeks this Court to remand the case for retrial or to reverse the conviction for aiding and abetting Lynn Christiansen in filing a false insurance claim.

STATEMENT OF FACTS

Lynn Christiansen was the principal in the criminal episode. He was given immunity from prosecution on the charge of filing a false insurance claim as well as on a separate forgery charge, in exchange for his testimony against the defendant. The defendant was convicted of aiding and abetting Lynn Christiansen in the filing of his false insurance claim.

Without question Christiansen's home was burglarized on or about June 14, 1975, thereafter he filed an insurance claim with National American Insurance Company. It is further uncontroverted that $140.00 in cash, a Sony cassette stereo, a silver jewelery case and a Sony clock-radio were taken, although there was testimony at the trial that Mr. Christiansen's ex-wife had taken the Sony clock-radio without his knowledge. Those four items above were included on the insurance claim together with two diamond rings, which were purportedly not taken.

When the adjuster received the claim he required proof of ownership. Lynn Christiansen had been a regular customer of the defendant and had made numerous purchases from him, including rings, watches, a Sony T.V. set, a stereo, speakers and radio etc. Christiansen requested receipts from defendant and defendant supplied the receipts in Exhibits 4 and 5. Christiansen then submitted the claim form and receipts, receiving a draft for $1,130.75 from National American Insurance Company, payable to Lynn and Connie Christiansen. He forged his wife's endorsement and deposited the draft in his account using the proceeds exclusively for his own benefit.

Apparently, at the request of Christiansen's ex-wife, an investigation was initiated by the Utah County Attorney's Office in February of 1975. The investigators, from the outset, seemed more concerned with prosecuting the defendant than Mr. Christiansen. Mr. Christiansen testified that "It was either mine or his skin. It looked like he was a bigger pigeon." (R. 199)

On July 18, 1975, investigators from the Utah County Attorney's Office went to the defendant's place of business and asked him if he had made out the receipts which had been used to substantiate Christiansen's claim. Defendant replied that he had done so. The investigators then asked for defendant's records and defendant replied that they were over one year old and no longer were in his possession but he

would attempt to obtain them. When the investigators returned the invoices had not been found and a rather heated exchange took place; they left without the requested information.

Shortly thereafter charges were filed and at trial, a verdict of guilty was returned.

ARGUMENT

POINT I

NO CORROBORATIVE EVIDENCE OF THE ACCOMPLICE'S TESTIMONY WAS GIVEN AT TRIAL AND THE CONVICTION SHOULD NOT BE SUSTAINED.

"77-31-18 Conviction on testimony of accomplice." provides in pertinent part as follows:

> "A conviction shall not be had on the testimony of an accomplice, unless he is corroborated by other evidence, which in itself and without the aid of the testimony of the accomplice tends to connect the defendant with the commission of the offense; and the corroboration shall not be sufficient, if it merely shows the commission of the offense or the circumstances thereof."

It is established beyond question that an accomplice's testimony need not be corroborated with respect to every material fact, but only in respect to such material facts as constitute necessary elements of the crime. State v. Collett, 20 U. 290, 58 P. 684; State v. Spencer, 15 U. 149, 49 P. 302; State v. Somers, 97 U. 132, 90 P.2d 273 (1939);

State v. Erwin, 101 U. 365, 120 P.2d 285 (1941); State v. Simpson, 120 U. 596, 236 P.2d 1077 (1951).

The trial court ruled that Lynn Christiansen was an accomplice and instructed the jury that in order to convict the defendant, Christiansen's testimony must be corroborated (R. 36). The prosecutor urged the jury and the court that the admitted fact that the defendant prepared the receipts in the instant case and the fact that Christiansen's former wife testified that she was not aware of Christiansen's ownership of any of the items listed on the claim, except the Sony clock-radio, at the time of the burglary in June of 1974, was sufficient corroboration (R. 6).

To determine if corroboration is sufficient this court has stated that the evidence must be reviewed disregarding the testimony of the accomplice. State v. Simpson, supra; State v. Vigil, 123 U. 495, 260 P.2d 539 (1953); State v. Clark, 3 U.2d 382, 284 P.2d 700 (1955).

> "the corroborating evidence must connect the defendant with the commission of the offense State v. Lay, 38 Utah 143, 110 P. 986 (1910); and be consistent with his guilt and inconsistent with his innocence, State v. Butterfield 70 Utah 529, 261 P. 804. The corroborating evidence must do more than cast a grave suspicion on the defendant and it must do all of these things without the aid of the testimony of the accomplice." State v. Vigil, supra at 123 U. 497, 260 P.2d 541.

Without the testimony of Lynn Christiansen there is no evidence that any crime was ever committed.

> "[19] In order to sustain a conviction, the evidence must not only show the corpus delicti independent of the admissions and connect each defendant convicted with the offense charged, without the aid of the testimony of an accomplice, but also must be of such persuasive force that the mind might be reasonably satisfied of all the necessary facts constituting the defendant's guilt beyond any reasonable doubt; and where the proof of a necessary fact is dependent solely upon circumstantial evidence, such circumstances must be such as to reasonably exclude every reasonable hypothesis other than the existence of such fact and be consistent with its existence and inconsistent with its non-existence. It is not necessary that each circumstance in itself establish the guilt of the defendant, but the whole chain of circumstances, taken together, must produce the required proof. State v. Crawford, 59 Utah 39, 201 P. 1030; State v. Marasco, 81 Utah 325, 17 P.2d 919; Terry v. United States, 9 Cir., 7 F.2d 28; State v. Burch, Utah, 115 P.2d 911," State v. Erwin, supra.

Aside from Christiansen's testimony, what evicence consistent with the guilt of the defendant and inconsistent with his innocence is there? The testimony of the insurance adjuster, the two investigators for the Utah County Attorney's Office, the defendant and his employee merely establish that the defendant authored two receipts which were used to prove ownership of the items claimed. Nothing in their testimony would corroborate Christiansen's testimony under the rules stated by this Court.

The only other witness for the State in corroboration was Christiansen's ex-wife. She testified that at the time of the burglary she and Mr. Christiansen were legally separated and not living together (R. 154). She stated that she was unaware of the burglary or of the existence of the items listed on the claim with two exceptions. She stated that an antique jewelery box was in fact owned by them and in fact was missing (R. 158) and further that Christiansen did in fact own a Sony clock-radio, the place of purchase was unknown to her (R. 156). No other evidence in corroboration was presented. Nor is there proof of the corpus delecti absent the testimony of the accomplice, as required by State v. Erwin, supra, et al.

"It is well established that a defendant may not be convicted by a jury upon uncorroborated testimony of an accomplice, even though they believe his testimony as to every material fact and are convinced of the guilt of the defendant beyond a reasonable doubt." State v. Lay, supra. In the instant case the jury did so and their verdict should be reversed.

POINT II

THE EVIDENCE ADDUCED AT TRIAL DOES NOT SUPPORT A CONVICTION IN THE FOLLOWING PARTICULARS:

(A) The claim filed was not a "false or fraudulent

claim" as defined by this court in Burke v. Knox, 59 U. 596, 206 P. 711 (1922) but rather an "excessive claim".

(B) If the claim was false or fraudulent, the false or fraudulent portion did not exceed $1,000.00.

(A) This court has drawn a distinction between "false or fraudulent claims" and "excessive claims" in Burke v. Knox, supra. In that case a county commissioner was charged with having made a "false or fraudulent claim" upon a claim for travel reimbursement and this court held,

> "If the Plaintiff presented merely an excessive claim for expenses incurred in traveling, that is one thing. If he presented a claim or charge for a trip that he did not make at all, that is quite a different matter. Presenting a merely excessive claim without intent to defraud would not constitute a felony. . ." Burke v. Knox id at 206 P. 714.

Since the evidence adduced by the State, taken in its most favorable light, indicates that at the time Christiansen filed his claim he believed all items, except two, had been taken. Therefore, his claim was excessive, but not false and fraudulent. (See also, People v. Nichols, 125 P.2d 513 (Cal 1942); Nemecek v. State, 114 P.2d 492 (Okla 1941).

(B) The record indicates (R. 89) that the claim filed by Christiansen was in part true and in part false. The only items on the claim which in fact were not thought to have been

taken in the burglary were the two diamond rings (R. 195) and the stereo speakers which Christiansen had in fact purchased from defendant (R. 185). The value placed on the rings was $675.00.

Taken another way, the information alleged that defendant aided and abetted Lynn Christiansen to file a false insurance claim in the amount of $1,130.75. The evidence proves that $140.00 in cash, a Sony clock-radio, a silver jewelery case, the amplifier and recording head portion of a Sony cassette tape deck and $45.50 worth of tapes were missing and thought to have been stolen at the time the claim was filed by Lynn Christiansen.

The jury did not believe the defendant nor Sheryl Mecham, defendant's employee, when they testified that defendant had sold all of the items listed on the receipts to Christiansen. The jury could not have believed Christiansen when he testified that he had purchased the stereo speakers from defendant and that $140.00 in cash had been taken with the stereo, jewelery case, tapes and cassettes. However, simple mathematics now leaves the State without an iota of evidence supporting conviction of the defendant of the crime set forth in the information.

"76-6-521 False or fraudulent insurance claim - Punishment as for theft." provides in pertinent part as follows:

> "Every person . . . who prepares . . . any . . . writing . . . with intent to . . . allow it to be presented or used, in support of any such claim [a false or fraudulent claim upon a contract of insurance for the payment of loss] is punishable as in the manner prescribed for theft of property of like value."

"76-6-412 Theft - Classification of Offenses . . ." reads in pertinent part as follows:

> "(1) Theft of property and services as provided in this chapter shall be punishable as follows:
> (a) As a felony of the second degree if:
> (i) The value of the property or services exceeds $1,000.00; . . .
> (b) As a felony of the third degree if:
> (i) The value of the property or services is more than $250.00, but not more than $1,000.00; . . ."

It is well established that a claim which is false or fraudulent only in part, may be prosecuted if at all only to the extent to which it is excessive Burke v. Knox, supra; People v. Dally, 24 N.Y.S.2d 692 at 695.

It would appear that Lynn Christiansen did not file a false or fraudulent claim in excess of $1,000.00 therefore, defendant could not lawfully have been convicted of a second degree felony of aiding and abetting the filing of such a claim.

CONCLUSION

It is respectfully submitted that the conviction of the defendant was contrary to law, in that there was no

corroboration of the accomplice's testimony nor independant proof of the corpus delecti and that the proof of the false claim was deficient, and should be reversed and remanded for dismissal or retrial.

Respectfully submitted this 29th day of December, 1976.

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I hereby certify that I caused three copies of the foregoing to be delivered, this 29th day of December, 1976, to Vernon B. Romney, Attorney for Plaintiff-Respondent, 236 State Capitol Building, Salt Lake City, Utah 84104.

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